

STATE OF MICHIGAN
IN THE SUPREME COURT
ON APPEAL FROM THE MICHIGAN COURT OF APPEALS

CENTRAL CEILING & PARTITION, INC.,)	Supreme Court No. 121009
Plaintiff-Appellee,)	
)	
v.)	Court of Appeals No. 225378
)	
STATE OF MICHIGAN DEPARTMENT OF)	
COMMERCE HOMEOWNER)	Wayne County Circuit Court
CONSTRUCTION LIEN RECOVERY FUND,)	No. 98-810597-CH
Defendant-Appellant,)	
)	
and)	
)	
KITCHEN SUPPLIERS, INC.,)	
Defendant, Cross and Counter)	
Plaintiff-Appellee,)	
)	
and)	
)	
CAPPY HEATING AND AIR)	
CONDITIONING, INC.,)	
Intervener, Cross-Claimant,)	
Counter-Claimant and)	
Third Party Plaintiff-Appellee.)	

**MICHIGAN LAND TITLE ASSOCIATION'S
AMICUS CURIAE BRIEF ON APPEAL
ORAL ARGUMENT REQUESTED**

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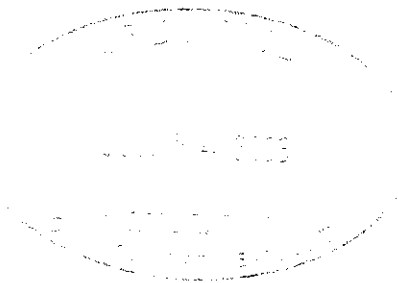


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STATEMENT REGARDING BASIS OF JURISDICTION
AND STANDARD OF REVIEW

This Court has jurisdiction over this matter pursuant to MCR 7.302F(1) and its Order of March 26, 2003, granting Defendant-Appellant Department of Commerce's Application for Leave to Appeal. The Court of Appeals affirmed the trial court's denial of Defendant-Appellant Department of Commerce's Motion for Summary Judgment and its granting Judgment in favor of Plaintiff-Appellee. *Central Ceiling & Partition, Inc. v Department of Commerce*, 249 Mich App 438, 642 NW2d 397 (2002).

The Michigan Land Title Association believes that this Court reviews *de novo*, as a question of law, the trial court's granting a motion for summary disposition and the Court of Appeals' affirmance of that judgment.

QUESTION PRESENTED FOR REVIEW

WAS THE COURT OF APPEALS CORRECT IN HOLDING THAT A CONSTRUCTION LIEN CLAIM PRESENTED TO AND ACCEPTED BY THE REGISTER OF DEEDS WITHIN 90 DAYS OF THE CLAIMANTS' LAST DATE OF FURNISHING MATERIALS WAS "RECORDED" WITHIN THE 90-DAY PERIOD REQUIRED BY MCL 570.1111(1) EVEN THOUGH THE LIEN CLAIM WAS NOT ASSIGNED LIBER AND PAGE NUMBERS UNTIL AFTER THE 90-DAY PERIOD HAD ELAPSED?

Court of Appeals answered "Yes."

Defendant-Appellant answers "No."

Plaintiff-Appellee answers "Yes."

Michigan Land Title Association answers "Yes."

I. SUMMARY OF ARGUMENT

In its January 29, 2002, opinion in this case, the Court of Appeals held that the "substantial compliance" provision of the Michigan Construction Lien Act, MCL 570.1302(1), was satisfied when subcontractors filed claims of lien and their claims were accepted by the Wayne County Register of Deeds before the expiration of the 90-day period within which construction lien claims must be recorded pursuant to MCL 570.1111(1), even though the lien claims were not "formally recorded" until after the 90-day period had passed. The court reasoned that subcontractors who fail to meet the statutory deadline due to variances in formal recording times by a register of deeds over which the subcontractors have no control should not be prejudiced in their ability to file claims of lien.

The Michigan Land Title Association ("**MLTA**") urges this Court to affirm the holding of the Court of Appeals, not because the 90-day time period set forth in MCL 570.1111(1) can be satisfied by substantial compliance (a conclusion that MLTA does not support), but instead because the lien claims in question were, in fact, recorded within the 90-day period. In reviewing this case *de novo*, it is critical that this Court focus on one issue—when is an instrument "recorded" so as to satisfy the requirements of MCL 570.1111(1).

MLTA is an association of professionals throughout Michigan who work in the title industry. Its members believe that the Court's decision in this case will have a far-reaching impact upon real estate transactions throughout Michigan. A determination that an instrument is not "recorded" for the purpose of determining the perfection of a lien against real property until it is "assigned a liber and page number noting the date, hour and minute it was entered into the books" (Appellant's Brief at p. 11) is not in accord with Michigan law, would lead to great

confusion due to different practices employed by different registers of deeds, and could ultimately undermine statutes like the Construction Lien Act in their entirety.

II. STATEMENT OF FACTS

MCL 570.1111(1) provides in relevant part:

The right of a...subcontractor...or supplier to...a lien...shall cease to exist unless, within 90 days after the lien claimant's last furnishing of labor or material...a claim of lien is recorded in the office of the register of deeds....

It is uncontested that the lien claims at issue in this case were presented to the Wayne County Register of Deeds within 90 days of the claimants' last furnishing of materials and labor.

The trial court found that:

The practice of the Wayne County Register of Deeds at times relevant to this action was to, upon presentation, mark a *[sic]* instrument submitted for recording with the current date using a simple date stamp.

Trial Court Findings of Fact and Opinion, Fact Finding No. 18. The parties do not contest this finding. It is also uncontested that the lien claims were not assigned liber and page numbers "noting the date, hour and minute of entry into the books" until after the 90-day period had expired.

Appellant Department of Commerce challenges the Court of Appeals' conclusion that there can be "substantial compliance" with the requirements of MCL 570.1111(1). Appellee argues that the holding of the Court of Appeals is correct. While MLTA agrees with some of the arguments proffered by Appellant, it rejects the conclusion Appellant urges this court to reach—invalidation of the lien claims. This Brief explains why.

MLTA is particularly concerned about the assumption made by the Court of Appeals and the parties to this case that the lien claims at issue were not "recorded" until after the 90-day period had expired. MLTA believes that for the purpose of determining whether such interests

were perfected under the statute, the liens were in fact recorded on a timely basis within the 90-day period.

In analyzing this case, the Court should consider not only the Construction Lien Act, but also MCL 565.25, which provides in relevant part:

(1) In the entry book. . .the register shall enter [the instrument received], noting in the books, the day, hour and minute of receipt. . .

(4) The instrument shall be considered as recorded at the time so noted. . .

III. ARGUMENT

A. MLTA Endorses the Appellant's Arguments In Part

1. Standard of Review

MLTA agrees with Appellant that this case presents a question of law, which is reviewed by this Court *de novo*. See *Vugterveen Systems, Inc. v Olde Millpond Corp.*, 454 Mich 119, 560 NW2d 43 (1997). In doing so, this Court should not only consider the interpretation of the "substantial compliance" and "90-day recordation requirement" of the Construction Lien Act, as suggested by Appellant, but also when an instrument is deemed recorded under Michigan law.

2. There Is No Ambiguity in MCL 570.1111(1), and the "Substantial Compliance" Exception Does Not Apply to the 90-Day Requirement

The provisions of MCL 570.1111(1) are clear and unambiguous. The right to a construction lien which is not recorded within 90 days of the last date of furnishing materials and labor "cease[s] to exist." In *Northern Concrete Pipe, Inc. v Sinacola Cos-Midwest, Inc.*, 461 Mich 316, 603 NW2d 257 (1999), this Court considered whether the "substantial compliance" exception should be applied in the case of a subcontractor who had initiated, but not completed, the process of claiming a construction lien within the 90-day period. Holding that the 90-day

requirement was not subject to the substantial compliance exception of the Act, this Court announced a five-part test for determining the scope of a statutory substantial compliance provision.

The scope of a statutory "substantial compliance" provision requires an analysis, on a case-by-case basis, of the following logically relevant factors among others: the overall purpose of the statute; the potential for prejudice or unfairness when the apparent clarity of a statutory provision is replaced by the uncertainty of a "substantial compliance" clause; the interests of future litigants and the public; the extent to which a court can reasonably determine what constitutes "substantial compliance" within a particular context; and, of course, the specific language of the "substantial compliance" and other provisions of the statute.

461 Mich at 321-322. This Court contrasted "substantial compliance" in connection with the filing of a lien claim with other circumstances, such as where a notice of furnishing requirement exists to put an owner on notice that a contractor is improving property and the possibility of a lien exists. It noted that in the latter circumstances, the court can ascertain whether, in fact, the owner received notice, even if not through a technical notice of furnishing. On the other hand, this Court noted that under the unambiguous language of the statute, the right to a lien ceases to exist if notice is not recorded in the county office of the register of deeds within 90 days after the last furnishing of labor or material. In *Northern Concrete*, this Court carefully distinguished *Brown Plumbing & Heating, Inc v Homeowner Construction Lien Recovery Fund*, 442 Mich 179, 500 NW2d 733 (1993), and the *Vugterveen Systems* case, acknowledging that the "substantial compliance" provision is applicable to Part 1 of the Construction Lien Act, although not necessarily "to every word of every provision within part one of the act." 461 Mich at 321 n15.

Applying this five-part test to the 90-day filing deadline, this Court in *Northern Concrete* determined that the substantial interest in certainty of land title; the unfairness of subjecting property owners and potential purchasers to researching the complete history of the property and

obtaining waivers from each contractor, subcontractor, materials supplier and laborer; and the arbitrariness of any deviation from the 90-day requirement support "a conclusion that the Legislature did not intend the 'substantial compliance' exception to apply here." 461 Mich at 323.

Appellant is correct. The 90-day time period is absolute. It cannot be varied. It is either met, or the lien claim fails.

3. There Is a Difference Between Filing and Recordation

Filing and recordation are different concepts. Appellant correctly notes that the Utah Supreme Court properly distinguished these concepts in *State v Noren*, 621 P2d 1224, 1225 (Utah 1980). Counsel for MLTA has also noted important differences between these concepts:

People often confuse the terms *recording* and *filing*. When a document is recorded, a record of it is made, but the original instrument is returned to the person to whom the register of deeds is directed to send it. When a document is filed, it is placed and kept on file. In each case a fee may be required.

John G. Cameron, Jr., *Michigan Real Property Law: Principles and Commentary*, Chapter 11, endnote 1 (2d ed, 1993).

B. MLTA Disagrees With Appellant on One Critical Issue—When An Instrument Is Deemed To Have Been Recorded

1. An Instrument Is Not Recorded at the Time When It Is Assigned Liber and Page Numbers As Asserted by Appellant, But Instead Upon Receipt By the Register of Deeds, As Evidenced By a Notation in the Entry Books

When the recording process is properly understood, it is apparent that the parties and the Court of Appeals are mistaken in simply assuming that an instrument is not recorded until it is assigned liber and page numbers noting the date, hour and minute it was entered into the books. And, there is no need to look to a dictionary to determine when an instrument has been recorded. Michigan law is well-settled that an instrument is considered recorded when a notation in the

entry book says it was received. The assignment of liber and page numbers is merely evidence of the instrument's recordation.

a. The Recording Process

(i) Entry Books

When the register of deeds or his or her assistant receives an instrument for recordation, he or she must determine whether the prerequisites for recording have been met.¹ If they have, he or she collects the recording fee, accepts the instrument, and notes the acceptance in an entry book. MCL 565.24 requires every register of deeds to keep entry books of deeds, mortgages, and levies.²

MCL 565.25 describes how the register of deeds is to make entries in the entry books. The pertinent portion of this statute requires the register to note "in such [entry] books, the day, hour and minute of the reception...." MCL 565.25(1). Under the statute, "[t]he instrument shall be considered as recorded at the time so noted...." MCL 565.25(4). Thus, recordation is effective as of the date and time of receipt—there can be no other reason for requiring the register to maintain a permanent record of this information.³ Thereafter, the record of these items in the entry and reception books is notice to all persons of the liens, rights, or interests acquired by or involved in such proceedings, and all subsequent owners take, or encumbrances take, subject to them.

¹ These include requirements as to both form and substance. They are set forth in MCL 565.25.

² These entry books of deeds and mortgages and the reception book of levies may be combined into one book. MCL 565.24. Statutory forms are provided for both the six- and nine-column entry books.

³ The statute does not say an instrument is deemed recorded at the time the notation was made, nor does it even require the register to maintain a record of when the notation was made.

The entry books themselves constitute constructive notice to purchasers and refer purchasers to the actual document on file for details. *Sinclair v Slawson*, 44 Mich 123, 6 NW 207 (1880).

(ii) Books of Record

After an instrument has been received and noted in an entry book, it must still be formally recorded, since the entry books serve only as a record of receipt. *Id.* There are sets of books, often referred to as "libers," into which the register records at full length all instruments accepted for recordation. It is these books to which Appellant refers when it argues for recordation only when "the instrument is assigned a liber and page number noting the date, hour and minute it was entered into the books." (Appellant's Brief at p. 11.) But there is no requirement in Michigan law that the registers maintain a record of when an instrument is placed into one of the libers.

Today, records are generally preserved on microfiche. *See generally* OAG, 1955-1956, No. 2,449, p 161 (March 26, 1956). A register of deeds who uses a medium pursuant to the Records Media Act, MCL 24.401 *et seq.* (i.e., photograph, photocopy, microcopy, or optical storage disk), may combine all reproductions of instruments into one set of books called the "Register of Deeds Records." MCL 565.26.

On every instrument that he or she records, the register must certify the time when it was *received* and a reference to the book and page where it is recorded. MCL 565.27. But the time of recordation is the time of receipt, as noted in the entry book and, presumably, upon the instrument itself. Following recordation, the original copy of the recorded instrument is returned to the person entitled to receive it. This assures the person of its recordation and constitutes evidence of recordation. *See Jakway v Jenison*, 46 Mich 521, 9 NW 836 (1881).

(iii) Indexes

Over time, a large number of instruments have been recorded in every Michigan county. Thus, to be useful to anyone seeking to gather information, the instruments recorded in each county must be indexed. According to MCL 565.28, every register of deeds must keep a proper general index to each set of books in which the register enters, alphabetically (by surname in the case of an individual), the name of each party to each instrument recorded, with a reference to the book and page where the instrument is recorded. In counties in which copies of instruments are reproduced pursuant to the Records Media Act and are combined into one set of books, the register is required to keep separate indexes of those instruments.

The indexes required by MCL 565.28 may be maintained wholly or in part by computerization. Where computerized, a duplicate index must be maintained at a separate location, and the computerized index must be protected from alteration by an unauthorized person. MCL 565.28(2)-(4).

C. In the Absence of an Entry Book, When Is an Instrument Deemed Recorded?

Unfortunately, the registers of deeds in a number of Michigan counties, including Wayne County, have elected not to maintain entry books, even though they are required by statute to do so.⁴ That fact complicates this case. The question this Court must consider, then, is when is an instrument deemed recorded in the absence of entry books? There are three options—(i) when

⁴ Nor were entry books maintained in Wayne County in 1997. Wayne County acknowledges that it is required by law (MCL 565.24) to keep entry books, but it has decided to employ a different system of reception. Under the system used in Wayne County today (but not in 1997), instruments received are assigned, within 24-48 hours of receipt, a "batch number" based upon their date of receipt. An instrument is considered "recorded" by the Wayne County Register of Deeds when it has been assigned a batch number, even though it is not given liber and page numbers for some time. Telephone interview with Christine McClenan, Deputy Wayne County Register of Deeds, June 24, 2003. The opinion of a county register of deeds cannot, of course, overrule a statute. However, this system at least approximates the legislative intent, as gleaned from MCL 565.24, .25, and .27, that instruments are deemed recorded upon receipt.

the instrument is presented for recordation in proper form and upon payment of the recording fee, (ii) when liber and page numbers are assigned to the instrument, or (iii) when the instrument is indexed. MLTA believes that arguments can be made in favor of options (i) and (iii), but that it makes no sense to deem an instrument recorded at the time it is assigned liber and page numbers "noting the date, hour and minute it was entered into the books."

Liber and page numbers are, in some counties, assigned upon presentation of an instrument and in other counties as an interim step between receipt and indexing.⁵ Thus, determining that an instrument is recorded at the time when liber and page numbers are assigned would lead to inconsistent results in construction lien actions in different counties throughout the State. And, the assignment of liber and page numbers is not, in and of itself, a significant event. Liber and page numbers are used to identify the location of documents within the system, but only in the context of an index. Instruments that have been assigned liber and page numbers but have not been indexed are no more searchable than documents that have been presented but not assigned liber and page numbers. Until indexing, if a member of the public is even allowed to look at the documents received, the search process is simply random. Finally, despite Appellant's contention, neither MCL 565.25(4) nor its cousins, MCL 565.24 and .27, refer to the time an instrument was entered or "spread upon" the books or when it was assigned liber and page numbers.⁶ No analogy can be drawn.

Deeming an instrument to have been recorded when it has been indexed is appealing because indexing is the final step necessary to the recordation process, and indexing renders the

⁵ Compare interview with Kent County Register of Deeds office, June 23, 2003 (liber and page numbers assigned immediately upon receipt), *with* Trial Court Findings of Fact and Opinion, Fact Finding No. 18 (liber and page numbers assigned 4-8 weeks after receipt).

⁶ To the contrary, all three of these statutes refer only to the terms an instrument was received by a register of deeds.

instrument searchable. The problem with adopting indexing as the time of recordation is that there are significant delays between receipt, assignment of liber and page numbers, and indexing in many counties. Such delays, often many months, could upset established practice as to the rights of third parties.⁷ In fact, in *Sinclair v Slawson*, 44 Mich 123, 6 NW 207 (1880), Justice Cooley noted that considerable time will elapse between the entry and the actual copying of an instrument upon the record book. He did not, however, conclude that an instrument went unrecorded during this lapse of time.

The final choice, and the only one having a basis in Michigan law, is that for purposes of perfection of a lien claim, in the absence of entry books, an instrument should be deemed recorded when it has been presented to the register of deeds, the recording fee has been paid, and it has been accepted by the register of deeds. That is because this point in time best captures the Legislature's intent as set forth in MCL 565.24, .25 and .27. The first thing that the register of deeds is supposed to do upon receipt of an instrument for recordation is to make a notation of it in the entry book. Included in the notation is to be the day, hour and minute of *receipt*. MCL 565.25(1). It is the time shown in the entry book as when the instrument was received, that an instrument is deemed as having been recorded.⁸ That is why MCL 565.27 requires a register to certify the time of receipt on the face of the instrument. The lien claims at issue in this case would have been deemed recorded upon receipt had there been entry books. There is no reason

⁷ For example, Section 547 of the Federal Bankruptcy Code, 11 USC 547, provides that a security interest that is perfected on or before 20 days after a debtor receives possession of real property is not a voidable preference. As in the Construction Lien Act, the concept of "perfection" is tied to recordation. If recordation were deemed by the Court to occur only upon indexing, a number of otherwise valid mortgages could be impaired.

⁸ Even if one were to construe MCL 565.25(4) as stating that an instrument is deemed recorded not at the time of receipt, but at the time the notation was made in the entry book (a construction that, for the reasons noted above, does not make sense), receipt remains the closest point in time to this statutorily contemplated event.

for this Court to reach a contrary result just because Wayne County fails to maintain entry books.⁹

D. Appellant Presents Unrealistic Alternatives for Lien Claimants

Appellant states that "unlike an innocent third party, lien claimants can check on lag time at a register of deeds office and file their liens sooner if necessary to insure recording within the 90 days from last furnishing; they can mark their calendars to follow-up on whether their liens have been recorded; or they can view the books at the register of deeds for recording." These precepts are appealing in theory. However, they are wholly unrealistic in practice.

First, lien claimants are themselves "innocent parties." The lag time at the various register of deeds offices varies from week to week. Even if a lien claimant, who may well be a small business or even a laborer, knew how to contact the register of deeds and ask the question properly, he or she might get a different answer depending upon which week they chose to call. He or she would certainly get a different answer in different counties. Appellant therefore seems to suggest that potential lien claimants must constantly monitor the work load of the various registers of deeds around the State of Michigan. This seems like an excessive burden for a lien claimant to bear.

Second, it is uncertain whether the register of deeds would be able to tell a lien claimant whether or not his or her lien claim has been recorded at any point in time, due to the many thousands of records that the registers of deeds receive, particularly in busy counties like Wayne

⁹ The Construction Lien Act is a remedial statute that is to be liberally construed to secure its beneficial results, intents and purposes. While this Court has properly concluded that recordation must occur strictly within the 90-day period, it could if necessary conclude that a more liberal construction of what constitutes "recordation" is appropriate where a lien claimant has fulfilled every prerequisite to recordation, and it is only the failure of the county register of deeds to comply with the statutory mandate of MCL 565.24 that results in an issue about when recordation occurs. In MLTA's view, that is unnecessary in this case.

County. It is more likely that a lien claimant will only know if his or her lien claim has been recorded when he or she receives it back from recordation in the mail.

Third, viewing the books at the Wayne County Register of Deeds for recordation is also unrealistic. There are no entry books. Looking through the books at thousands of entries in an attempt to find reference to a particular instrument would be a frustrating, time-consuming process. Until the instruments are indexed, it is simply not practical to look at whatever books may exist.

E. Appellant's Position Could Lead to the Elimination of the Right to a Construction Lien in Wayne and Other Counties

If Appellant's position is adopted, the right of an unpaid contractor, subcontractor, supplier or laborer to assert a construction lien could be impaired or even eliminated. There may be times when, if Appellant's position as to the date of recordation were to be accepted, the lapse between presentment and the assignment of liber and page numbers will exceed 90 days in Wayne County, and perhaps others, due to an extensive backlog and understaffing. Following Appellant's theory, then, contractors, subcontractors, material suppliers and laborers would under such circumstances no longer have any right to a construction lien in Wayne (or some other) County, since even if they presented their lien claim for recordation on the day of last work,¹⁰ it would not, under Appellant's theory, be "recorded" until more than 90 days later. No lien claim could be perfected in a county in which more than 90 days elapse between presentment and the assignment of liber and page numbers, and the Construction Lien Act would have been rendered null and void in those counties. This conclusion is illogical and deprives lien claimants of rights afforded by the Legislature.

¹⁰ This is unlikely because typically a lien claim is not asserted until a payment has been missed, and construction projects are usually paid on a 30-day cycle.

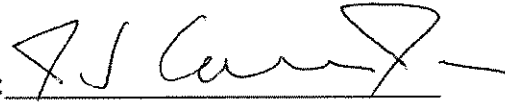
IV. CONCLUSION

The registers of deeds in this State are doing the public a great disservice by ignoring the statutory mandate that they maintain entry books. Their doing so can substantially prejudice the rights of third parties. But this case does not involve third parties. The Court of Appeals reached a sensible conclusion in this case, albeit for the wrong reason.

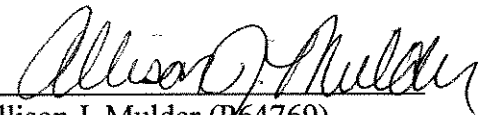
MLTA urges this Court to resolve the narrow question before it by concluding that for the purpose of perfecting a lien claim under the Construction Lien Act, an instrument is deemed recorded when it has been presented to the register of deeds in proper form, the recording fee has been paid, and it has been accepted for recording—the time of receipt.

Dated: June 24, 2003.

Respectfully submitted,
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